UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DONALD G. PHILLIPS, Appellant, v. DEPARTMENT OF VETERANS AFFAIRS, Agency.	DOCKET NUMBER SL0752920258-I-1 DATE: JUN - 8 1993

Daniel T. Moore, Esquire, Law Offices of L. Joe Scott & Daniel T. Moore, Poplar Bluff, Missouri, for appellant.

James Mantia, Esquire, St. Louis, Missouri, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has petitioned for review of the August 3, 1992 initial decision affirming his indefinite suspension. For the reasons set forth below, the Board GRANTS the appellant's petition and AFFIRMS the initial decision as MODIFIED by this Opinion and Order, still sustaining the indefinite suspension.

BACKGROUND

On February 18, 1992, the agency placed the appellant on non-duty status with pay apparently based on an incident involving a police raid of the appellant's home in which the officers allegedly confiscated video tapes and other items. *See* Initial Appeal File (IAF), Tab 5 (Agency Exhibits 1, 2, & 3). The appellant, a Chaplain at the Department of Veterans Affairs (DVA) Medical Center in Poplar Bluff, Missouri, was subsequently charged in a criminal complaint filed by the county prosecuting attorney on February 21, 1992, with three felony counts: (1) Abuse of a child, (2) endangering the welfare of a child in the first degree, and (3) tampering with physical evidence. Each felony count carried a penalty that included a sentence of imprisonment not exceeding from 5-7 years. *See* IAF, Tabs 1, 5 (Agency Exhibits 5, 12 at 4). The counts charged that the appellant filmed a girl of less than 17-years of age, who was bound and gagged, engaging in the simulation of sadism or masochism, that he created a substantial risk to the girl's body or health by tightly binding her wrists and ankles and gagging her in an atmosphere of sexual bondage, and that he altered physical evidence by destroying a video tape on February 13, 1992. *See* IAF, Tab 5 (Agency Exhibit 5).

On February 24, 1992, the agency proposed the appellant's indefinite suspension pending an agency investigation based on his arrest on or about February 17, 1992, for tampering with evidence, and the charges brought against him by the county

prosecutor. *See* IAF, Tabs 1, 5 (Agency Exhibits 8, 15). On March 18, 1992, the agency notified the appellant that his suspension would become effective April 3, 1992, pending resolution of the criminal investigation and possible prosecution. *Id.* The decision notice also stated that a proposal to remove him could be made while he was still in indefinite suspension status. *See* IAF, Tabs 1, 5 (Agency Exhibit 15).

On appeal, the appellant contended that his arrest and the filing of criminal charges were insufficient to support the indefinite suspension. *See* IAF, Tabs 4, 7, 12 [Initial Decision (ID)] at 1. He acknowledged, however, that he was arrested, booked, and released on $5000.00 bail pending a preliminary hearing. *Id.* He further contended that the agency had not conducted an independent investigation and could not rely on hearsay and newspaper articles to support its action. *See* IAF, Tab 4. Also, he contended that there was no nexus and that the action was invalid because it lacked a condition subsequent. *Id.*

In his initial decision, the administrative judge found that the agency had failed to introduce evidence that an arrest warrant had been issued, although there was evidence that a search warrant had been issued. *See* ID at 3. He nevertheless noted that other circumstances could show that the agency had reasonable cause to believe that the employee may have committed a crime for which a sentence of imprisonment could be imposed, including the filing of a

"criminal complaint." *See* ID at 3. This, the administrative judge found, alone was sufficient to give the agency reasonable cause to believe the appellant had committed felony crimes, irrespective of whether an arrest warrant had been issued or a preliminary hearing held. *See* ID at 3-4. In this connection, he found that a criminal complaint was the equivalent of a criminal information, which the Board has found to meet the reasonable cause requirement. *Id.* Therefore, he found that the agency had shown reasonable cause to believe that the appellant had committed crimes for which a sentence of imprisonment might be imposed. *See* ID at 4.

The administrative judge further found that the indefinite suspension had an ascertainable end and that the agency had shown nexus between the appellant's off-duty criminal charges and his position of chaplain. *See* ID at 4-5. In addition, the administrative judge found that, because of the seriousness of the criminal charges brought against the appellant and the potential for severe adverse impact on the agency's mission if those charges were true, the indefinite suspension was reasonable and promoted the efficiency of the service. *See* ID at 5. Accordingly, the administrative judge affirmed the agency's action. *See* ID at 6.

ANALYSIS

In his petition for review, the appellant contends that, contrary to the administrative judge's finding below, the filing of a criminal complaint is not analogous to the filing of a criminal information under Missouri State law. *See*

Petition for Review (PFR) at 2-4. Unless the defendant has waived his right to a hearing, the appellant argues that a criminal information, unlike a criminal complaint, cannot be filed until after a preliminary hearing has been held and a magistrate has made a finding of probable cause. *Id.* Furthermore, he argues that there are no other circumstances or facts in his case that would permit the agency to find reasonable cause to indefinitely suspend him. *See* PFR at 5.

We agree with the appellant that the administrative judge incorrectly equated the filing of a criminal complaint with the filing of a criminal information. Under Missouri law, the filing of the criminal complaint is only the first step in the information proceeding. *See State v. Thomas*, 674 S.W.2d 131, 135 (Mo. App. 1984), *cert. denied*, 469 U.S. 1223 (1985). Moreover, Missouri law requires that all persons be granted a preliminary hearing prior to the filing of any information setting forth felony charges. *See* Mo. Rev. Stat. § 544.250. In the appellant's case, the preliminary hearing was still pending. Therefore, we find that the administrative judge erred in finding that the filing of a criminal complaint is a proper basis for the agency to find reasonable cause.

Nonetheless, we find preponderant evidence in the record to show, consistent with *Dunnington v. Department of Justice*, 956 F.2d 1151, 1157 (Fed. Cir. 1992), that the agency had the requisite reasonable cause to support its indefinite suspension action. In *Dunnington*, the court stated that "it is incumbent upon the agency when an arrest warrant is a major

part of the case to assure itself that the surrounding facts are sufficient to justify summary action by the agency." 956 F.2d at 1157. In this case, we note that, while the appellant offered some ersatz defenses to the agency's action in his oral response, e.g., the complainant's mother was present during the videotaping and the complainant stated that her wrists were hurt by the ropes only after she was "coached," the appellant did not deny the underlying facts of the criminal charges but implicitly acknowledged their existence. See IAF, Tab 5 (Agency Exhibit 14).

Hence, we find that, examining all of the circumstances in this case, the agency has proven that there was more than enough evidence of possible misconduct to meet the threshold reasonable cause requirement. *See Dunnington* at 1157. *Cf. Reed v. U.S. Postal Service*, 54 M.S.P.R. 648, 654 (1992) (where, unlike here, the appellant only admitted the facts of his arrest and incarceration on criminal charges). Therefore, we conclude that the administrative judge's error was not prejudicial to the appellant's substantive rights, and does not provide a basis for reversal of the initial decision. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

ORDER

This is the Board's final order in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.